No. 86-177

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY R. TANNER AND WILLIAM M. CONOVER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioners' Sixth Amendment right to trial by an impartial jury by denying, without an evidentiary hearing, their motion for a new trial based on allegations of juror intoxication.

2. Whether 18 U.S.C. 371, which makes unlawful a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose," applies to an agreement to defraud a corporation of monies borrowed from one federal agency and guaranteed by another federal agency.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 772 F.2d 765.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1985. A petition for rehearing was denied on June 26, 1986 (Pet. App. 1-2). The petition for a writ of certiorari was filed on August 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial before the United States District Court for the Middle District of Florida, petitioners were convicted of conspiracy to defraud the government in violation of 18 U.S.C. 371 (Count One). Petitioner Conover was

also convicted on four mail fraud counts, in violation of 18 U.S.C. 1341 (Counts Two through Five). Petitioner Tanner was convicted on three of the mail fraud counts (Counts Two, Four, and Five).[1] Pet. App. 8. Each petitioner was sentenced to concurrent 18-month terms of imprisonment on each count. Petitioner Tanner was also fined $10,000.

1. At trial, the government established that petitioners defrauded the Seminole Electric Cooperative, Inc. (Seminole) when petitioner Conover, who was Seminole's procurement manager, assisted petitioner Tanner in his efforts to secure two contracts from Seminole for the construction of an access road (Pet. App. 3-8). Conover tailored the specifications for the two contracts, which were to be awarded on the basis of competitive bidding, to ensure that Tanner would be the lowest bidder (*id.* at 6-7). In exchange, Tanner assisted Conover in several financial endeavors; Tanner lent Conover money to enable him to purchase a condominium owned by one of Tanner's companies; and Tanner arranged for Conover to be awarded contracts to manage and perform landscaping work at the condominium complex (*id.* at 5-6). Monies that Seminole used to fund the contracts awarded to Tanner were part of a total of $1.1 billion in federal loan funds. The federal funds had been borrowed from the Federal Financing Bank, an agency of the United States Treasury, and the loan was guaranteed by the Rural Electrification Administration (REA), an agency of the United States Department of Agriculture. The purpose of the loan was to enable Seminole to build a coal-fired power plant near Palatka, Florida (*id.* at 3-4). The access road was needed for the construction of transmission lines for the power plant (*id.* at 4).

[1]Petitioner Tanner was acquitted on Count Three (Pet. App. 13 n.2). An earlier trial of both petitioners resulted in a mistrial because the jury was unable to reach a verdict (*id.* at 8).

2. After their conviction, but prior to sentencing, petitioners moved for an order permitting them to interview jurors, in order to explore an allegation of juror misconduct (Pet. App. 9).[2] By affidavit, petitioner Tanner's counsel alleged that he had received an unsolicited telephone call from a juror who claimed that several jurors had been drinking during the luncheon recesses and had fallen asleep during the trial (*ibid.*). The district court held a hearing on petitioners' motion and subsequently denied the motion.

While this case was on appeal, petitioners filed a second motion for a new trial based on new allegations of jury misconduct made by a second juror who had contacted petitioner Tanner's counsel (Pet. App. 9). The juror alleged that several jurors, including himself, drank beer and smoked marijuana during the luncheon recesses (*id.* at 9, 27, 29, 31-33, 37-39). He also alleged that two jurors had occasionally ingested cocaine during the noon recess (*id.* at 9, 39, 41-44, 50-51). The juror stated that the drinking and drug use had affected his ability to reason during one day in the middle of the trial (*id.* at 55) and that he thought that the two principal drug users had fallen asleep during the trial (*id.* at 46). The district court denied the motion for a new trial (*id.* at 9).

3. On appeal, petitioners challenged, inter alia, the district court's refusal to conduct an evidentiary hearing on their motion for a new trial based on alleged juror misconduct (Pet. App. 8). Petitioners also claimed that the indictment did not charge, and the evidence did not prove, a conspiracy to defraud the government within the meaning of 18 U.S.C. 371 (Pet. App. 10). The court of appeals rejected both claims (*id.* at 3-16).

[2]Under Local Rule 2.04(c) of the Middle District of Florida, attorneys are barred from contacting jurors unless they move for an order permitting such an interview. Unless good cause is shown, any such motion must be made within ten days after the verdict and must specify the names and addresses of the persons the attorney wishes to interview.

ARGUMENT

1. Petitioners contend (Pet. 7-11) that the district court should have held an evidentiary hearing to consider their allegation that jurors abused alcohol and drugs during the trial. The failure to hold such a hearing, they claim, violated their Sixth Amendment right to trial by an impartial jury.

The court of appeals correctly concluded that the Sixth Amendment did not require the trial court to hold an evidentiary hearing prior to denying petitioners' motion for a new trial. The Sixth Amendment does not require that a trial court hold an evidentiary hearing in response to every allegation of jury misconduct. Rather, the need for an evidentiary hearing turns on the nature of the allegation made in a particular case. When, for example, the allegation suggests that the juror was exposed to potentially prejudicial extrinsic influence, the Sixth Amendment normally requires that a trial court hold an evidentiary hearing to consider the allegation. See *Smith* v. *Phillips*, 455 U.S. 209 (1982); *Remmer* v. *United States*, 347 U.S. 227 (1954). The traditional presumption against post-verdict inquiry into jury deliberations is overcome in that circumstance by a presumption of prejudice to the defendant's right to an impartial jury. Substantial claims of juror partiality due to extrinsic influence are by their nature susceptible to meaningful exploration and evaluation only through an evidentiary hearing.

As the court of appeals properly recognized, however, the Sixth Amendment does not automatically require an evidentiary hearing in a case, such as this one, where the allegations of juror misconduct concern intrinsic sources of influence bearing on jury competence during the trial. To be sure, as the authorities cited by petitioners suggest (Pet. 8-11), a defendant has a right to a mentally competent jury, and it is permissible for a court to hold an evidentiary hearing to consider allegations of juror incompetence if the

court concludes that there is substantial risk that the defendant was deprived of that right. Because that inquiry involves considerations internal to the jury process, however, courts have required an especially strong showing of incompetence prior to ordering a post-verdict inquiry. See, *e.g.*, *Government of Virgin Islands* v. *Nicholas*, 759 F.2d 1073, 1077-1081 (3d Cir. 1985); *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Sullivan* v. *Fogg*, 613 F.2d 465, 467 (2d Cir. 1980); *United States* v. *Dioguardi*, 492 F.2d 70, 78-80 (2d Cir.), cert. denied, 419 U.S. 829 (1974). Moreover, because an evidentiary hearing is not indispensable to the court's evaluation of certain types of allegations of juror incompetence, the Sixth Amendment does not mandate a hearing in those cases.

Unlike juror partiality, which tends to express itself only during jury deliberations and, hence, outside the presence of the trial judge, juror competence is often reflected in jury behavior that is observable during the trial. Consequently, the trial judge can often evaluate the force of the allegations based on his own observation of the jury during the trial. See *United States* v. *Dioguardi*, 492 F.2d at 81. As long as the allegations of intrinsic influence are susceptible to such a meaningful, independent judicial evaluation, the Sixth Amendment requires no more.

In this case, the allegations of juror misconduct concern matters of jury inattentiveness due to intoxication.[3] Juror

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[3]Although the allegations of juror misconduct describe in detail the activities of several jurors, they conclude only that the reasoning ability of the juror making the accusations was adversely affected one afternoon during the trial (not during the deliberations) (Pet. App. 55), and that some of the jurors' abuse of alcohol and drugs caused them to "fall[] asleep all the time during the trial" (*id.* at 46). As discussed in the text, the latter allegation was subject to independent evaluation by the trial judge who observed the jurors during the trial, and who from his observations concluded that the jurors had not fallen asleep (see Pet. 4).

inattentiveness, if it occurred, is often reflected in jury behavior in the courtroom during the trial. Indeed, the allegations upon which petitioners rely specifically state that several jurors were inattentive and slept during the trial (see note 3, *supra*). Such allegations are particularly susceptible to meaningful evaluation by a trial judge who, as in this case, has presided at a four-week trial during which he observed the jury. Cf. *United States* v. *Dioguardi*, 492 F.2d at 81.[4] In these circumstances, where the court had already held a hearing in response to petitioners' first set of allegations, the Sixth Amendment did not require that the court also hold a full-scale evidentiary hearing to supplement the court's own first-hand observation of the jury's behavior.

2. Petitioners also contend (Pet. 11-15) that the court of appeals erroneously rejected their claim that 18 U.S.C. 371, which makes unlawful a conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose," does not apply to the circumstances of this case. This claim, too, lacks merit and requires no further review.

Section 371 applies to a conspiracy to defraud an agency of the United States "in any manner or for any purpose." That language is clearly broad enough to apply to a case such as this one, involving a conspiracy to divert federal funds being lent to a private corporation to further specific federal policies. Under Section 371, "[i]t is not necessary

[4]In two cases relied upon by petitioners (Pet. 9-10), *United States* v. *Taliaferro*, 558 F.2d 724 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978), and *Lee* v. *United States*, 454 A.2d 770, 772-773 (D.C. 1982), cert. denied, 464 U.S. 972 (1983), the allegations of juror intoxication pertained only to jury conduct during deliberations. Because jury deliberations occur outside the presence of the trial judge, evidentiary hearings may be more appropriate in that setting. In this case the allegations included jury behavior during the trial—allegations that jurors fell asleep—which the trial judge could evaluate based on his own observations of the jury.

that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated * * *." *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); see *Dennis* v. *United States*, 384 U.S. 855, 861 (1966) (Section 371 applies to " 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government' " (citation omitted)). Petitioners' fraudulent activities diverted sums that were intended by the two participating federal agencies to promote rural electrification development in an honest and efficient manner.[5] Hence, petitioners were properly prosecuted under 18 U.S.C. 371.

[5]Petitioners do not suggest that the decision of the court of appeals presents a conflict in the circuits, but only that it is inconsistent with the Fifth Circuit decision in *United States* v. *Porter*, 591 F.2d 1048 (1979). Any suggestion of even an intracircuit conflict is meritless, however, because, as petitioners acknowledge (Pet. 14), the Fifth Circuit's subsequent decision in *United States* v. *Burgin*, 621 F.2d 1352, cert. denied, 449 U.S. 1015 (1980), is entirely consistent with the court of appeals' decision in this case. Indeed, the concurring opinion below, upon which petitioners heavily rely (Pet. 11, 12, 14-15), acknowledges that affirmance of petitioners' convictions was compelled by *Burgin*. In all events, the court of appeals in *Porter* reversed the conviction in that case on grounds not present here. In *Porter*, the government claimed that the defendants had violated 18 U.S.C. 371 by defeating the government's right to have the Medicare program operated honestly (591 F.2d 1056). The court of appeals concluded that the Medicare program did not at that time forbid the activities in which the government alleged the doctors had engaged (*ibid.*). In this case, by contrast, REA's contracts with Seminole required that the federal loan monies were to be used, in most cases, only after competitive bidding and, in all cases, only in the most cost-effective manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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